INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	5
Conclusion	8

CITATIONS

Cases:

Carroll v. *United States*, 267 U. S. 132	7
Husty v. *United States*, 282 U. S. 694	7
McNabb v. *United States*, 318 U. S. 332	6
Powers v. *United States*, 223 U. S. 303	6
United States v. *Block*, 88 F. 2d 618, certiorari denied, 301 U. S. 690	6
United States v. *Mitchell*, 322 U. S. 65	6
Wilson v. *United States*, 162 U. S. 613	6
Wood v. *United States*, 128 F. 2d 265	6

Statutes:

Internal Revenue Code:

Section 2803 (a) (26 U. S. C. 2803 (a))	3
Section 2810 (26 U. S. C. 2810)	2
Section 2814 (26 U. S. C. 2814)	2
Section 2834 (26 U. S. C. 2834)	2

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 154

MICHAEL J. CRYNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 265–269) is reported at 149 F. 2d 105, *sub nom. United States* v. *Heitner.*

JURISDICTION

The judgment of the circuit court of appeals was entered on May 23, 1945 (R. 274), the same date that a petition for rehearing (R. 269–272) was denied (R. 273). The petition for a writ of certiorari was filed on June 22, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the

Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Petitioner was arrested by state officers without a warrant. Immediately following the arrest he voluntarily admitted possession of a still. The question presented is whether this admission and other evidence obtained as a result of the arrest were improperly admitted in evidence at petitioner's trial because (1) when questioned by the officers he was not warned of his constitutional privilege against self-incrimination, or (2) the arrest assertedly was made without probable cause.

STATEMENT

On May 5, 1942, petitioner, Morris Heitner, and Charles Meierdiercks were indicted in the United States District Court for the Eastern District of New York in five counts charging substantive violations of the Internal Revenue Code in connection with the operation of an illicit still, and a conspiracy. Count 1 (R. 8–9) charged that on or about January 20, 1942, the defendants possessed an unregistered still (26 U. S. C. 2810); count 2 (R. 9–10), that they illegally made and fermented mash (26 U. S. C. 2834); count 3 (R. 11–12), that they commenced the business of a distiller without filing a notice of intention to do so and without executing a bond (26 U. S. C. 2814); count 4 (R.

12–13), that they possessed certain distilled spirits without having paid the taxes on such spirits (26 U. S. C. 2803 (a)); and count 5 (R. 13–20), that they conspired from December 14, 1941, to January 20, 1942, to commit various offenses in violation of the Internal Revenue Code provisions relating to distillation. The case was severed as to Meierdiercks, and petitioner and Heitner were convicted on all counts at their jury trial (R. 240). Petitioner was sentenced generally to imprisonment for eighteen months and to pay a fine of $1,000 (R. 241). Upon appeals to the Circuit Court of Appeals for the Second Circuit, by petitioner and Heitner, their convictions were affirmed (R. 274).

The pertinent evidence may be briefly summarized as follows:

In December 1941, petitioner, accompanied by the defendant Meierdiercks, located a vacant house in New York City for the purpose of using it as a location for an illegal distillery (R. 59–60). With the approval of the defendant Heitner (R. 61) and with money furnished by him, Meierdiercks rented the house, using the name "Ralph Harrison" (R. 62, 91, 92, 94). After the three defendants had examined the house with a view to ascertaining what repairs would be required to permit the installation of a still, Meierdiercks and Heitner procured the necessary plumbing supplies and refitted the plumbing structure of the house so that

it would accommodate a still (R. 61–64, 67, 100, 144). Sugar for use in the still was furnished by Heitner and unloaded at the still site by petitioner and Meierdiercks (R. 65–66). Shortly after the still commenced operations, it was detected by the police and the defendants were taken into custody.

The facts relating to petitioner's arrest, and which are relevant to his contentions in this Court, show that on January 20, 1942, New York City police officers Bender and Meyer were assigned to investigate the still premises. Bender testified (R. 35), "we were on night duty. We had a call from 105th Precinct. We were on division duty. We went up to the 105th Precinct. They gave us the information and we went over to the premises." At about 8 o'clock, while the officers were watching the house, they observed petitioner and Meierdiercks leave the house and drive away in an automobile (R. 24, 42) After following the car for a brief period, the officers unsuccessfully sought to reach an agent of the Alcohol Tax Unit and then returned to the house in which the still was located (R. 24–25, 42–43). A few minutes later, the automobile in which petitioner and Meierdiercks were riding returned to the vicinity of the house to see, as Meierdiercks testified, if "anybody is around" (R. 68); in the words of officer Bender (R. 25), the defendants were "looking us over." Apparently the defendants recognized the officers' car as the one which had previ-

ously followed them, for they then drove away at a high rate of speed; the police gave chase and overtook them (R. 25, 43). Petitioner was directed to get into the police car, while officer Meyer got into Meierdierck's car (R. 25–26, 43). Just as petitioner was entering the police car, Bender heard something drop; he picked it up and it was later found to be a key to the house in which the still was located (R. 26, 69). On the way back to the house, Bender identified himself as a police officer and asked petitioner what he had in the house. Petitioner replied, "I will tell you, we have a small still there, 225 gallons." (R. 26.) The officers then contacted agents of the Alcohol Tax Unit and together they all returned to the house and examined the premises (R. 26–27). In the house the officers found a still-warm 374-gallon still, sugar, prune mash, and all the paraphernalia used in operating a still (R. 27).

ARGUMENT

1. The evidence principally involved in petitioner's contention is the testimony of police officer Bender that, after petitioner had been placed in the police car, petitioner "asked me who I was. I said I am a policeman. He said you are a policeman? I said, that is right. I said what have you got in this house. He said, I will tell you, we have a small still there, 225 gallons." Bender further testified that when they reached the house, Federal Agent Brady referred to the key found by

Bender (see p. 5, *supra*) and asked petitioner, "is this the key [to the house]. He [petitioner] said, try it and see. Then Agent Brady opened the door and we entered the house and found the still." (R. 26–27). This evidence was initially admitted without objection by petitioner, but at the close of the Government's case a motion to strike was denied and exception taken (R. 182–183). Petitioner now urges that Bender should have advised him of his constitutional privilege against self-incrimination and that failure to do so required that petitioner's admission be excluded.

Petitioner does not deny that his admission was voluntarily made with knowledge that he was talking to a police officer. There can be no question that the rule of *McNabb* v. *United States,* 318 U. S. 332, is not applicable to this case. *United States* v. *Mitchell,* 322 U. S. 65. In these circumstances, it is settled that the mere fact that the officer did not first caution petitioner that his answer might be used against him does not mean that the trial court committed reversible error in admitting the challenged evidence. *Wilson* v. *United States,* 162 U. S. 613, 623; *Powers* v. *United States,* 223 U. S. 303, 313; *United States* v. *Block,* 88 F. 2d 618 (C. C. A. 2), certiorari denied, 301 U. S. 690.[1]

[1] *Wood* v. *United States,* 128 F. 2d 265 (App. D. C.), relied upon by petitioner (Pet. 12–14), was expressly concerned with judicial admissions, and since non-judicial admissions were distinguished, the case does not aid petitioner.

2. While the record does not fully reveal the basis upon which the police acted in making the arrests, since no inquiry was made into that subject at the trial, it does show, as the court below concluded after reviewing the facts summarized at pp. 4–5, *supra*, that the police officers had a "belief reasonably arising out of circumstances known" to them that a felony was being committed. *Carroll* v. *United States*, 267 U. S. 132, 149; cf. *Husty* v. *United States*, 282 U. S. 694, 700–702. In the words of the circuit court of appeals (R. 267–268):

> * * * the policemen were not asked what was the information they had received at the "Precinct." Had that been done, it might have appeared that they did not have enough to go on; but, as the record stands, it is proper to infer that what they there heard related to the unlawful use of the building for the making or storing of alcohol, else they would not have tried to make contact with Brady as they did. The information which we infer they then got, coupled with the observed conduct of Meierdiercks and Cryne, gave them "reasonable cause" to make the arrest. It is true that there was nothing suspicious in the fact that these two entered a car outside the building, or that they returned after the policemen came back; but what then occurred was ample confirmation of the information which they already had. It will be remembered that the two suspects then appeared

> to the policemen to "look us over" and almost at once turned about and made off at such a burst of speed, as could have left no doubt in any reasonable mind that they were trying to escape arrest, and that they feared to be connected with what might be found in the building. * * *

CONCLUSION

The trial judge concluded from the evidence "that there is not the slightest doubt in my mind of the guilt of the defendants" (R. 242) and the court below stated that there was undoubtedly sufficient evidence to support the conviction (R. 265). The case presents neither a question of importance nor a conflict of decisions. Accordingly, we respectfully submit that the petition for a writ of certiorari should be denied.

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